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*Please see continuation page for a complete list of the
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re:
SK FOODS, L.P., a California
limited partnership, et al.,
Debtors.

CASE NO.: 09-29162-D-11
Chapter 11
DCN: FWP-2

In re:
RHM INDUSTRIAL/SPECIALTY
FOODS, INC., a California
Corporation, d/b/a Colusa County
Canning Co.,
Debtor.

CASE NO.: 09-29161-D-11
Chapter 11
Date: June 9, 2010
Time: 10:00 a.m.
Cttrm: 34

**MOTION FOR ENTRY OF AN ORDER TO QUASH RULE 2004 SUBPOENA,
PRECLUDE PRODUCTION OF DOCUMENTS PURSUANT TO RULE 2004
SUBPOENA, OR, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER RE
SUBPOENA FOR RULE 2004 EXAMINATION OF COLLINS
AND ASSOCIATES AND PRODUCTION OF DOCUMENTS**

CONTINUATION SHEET: PARTIES

AND THEIR RESPECTIVE COUNSEL

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1 RHM Industrial/Specialty Foods, Inc., a California Corporation, d/b/a Colusa County Canning
2 Co. (“RHM,” and together with SK Foods, hereinafter “Debtors”). On May 7, 2009, voluntary
3 petitions for relief were filed. On May 17, 2009, the Court appointed Bradley D. Sharp as the
4 Chapter 11 Trustee (the “Trustee”).

5 2. Since the filings of the bankruptcy cases, the Trustee has commenced at least six
6 adversary proceedings (the “Adversary Proceedings”), all of which generally seek common relief
7 against or otherwise involve Salyer and companies owned by or related to Salyer. *See Sharp v.*
8 *Scott Salyer et al.*, AP No. 10-02014; *Sharp v. CSSS, L.P.*, AP No. 09-02543; *Sharp v. SSC*
9 *Farms I, LLC, SSC Farms II, LLC, and SSC Farming, LLC*, AP No. 09-02692; *Sharp v. Scott*
10 *Salyer and SKPM Corp.*, AP No. 10-02015; *Sharp v. SKF Aviation and CSSS*, AP No. 10-02016;
11 and *Sharp v. Fred Salyer Irrevocable Trust*, AP No. 10-02017.¹

12 3. On or about January 5, 2010, the United States of America filed a criminal
13 complaint against Salyer and others which as to Salyer has since been superseded by an
14 indictment (the “Criminal Matters”).

15 4. On April 13, 2010, the Trustee filed an Ex Parte Application for Order Pursuant to
16 Federal Rule of Bankruptcy Procedure 2004 Authorizing Examination of C.S. Collins and
17 Associates, Inc. d/b/a Collins and Associates and Production of Documents (the “Ex Parte
18 Application for Rule 2004 Order”). In support of the Ex Parte Application for Rule 2004 Order,
19 the Trustee filed his declaration and various other papers.

20 5. On April 15, 2010, the Court entered an “Order Authorizing Bankruptcy Rule
21 2004 Examination Collins and Associates and Production of Documents” (the “Rule 2004
22 Order”).

23 6. On or about April 20, 2010, the Rule 2004 Subpoena for the production of
24 documents was delivered to an employee (the “Employee”) at Collins and Associates LLP
25 (“Collins”). Attached as Exhibit “A” to the Exhibit Document is a true and correct copy of the
26 Rule 2004 Subpoena; *see also* Declaration of Cary Collins (“Collins Declaration”) ¶ 6.

27
28 ¹ The Objecting Parties hereby request the Court to take judicial notice of the pleadings in the
Adversary Proceedings.

Specifically, on April 20th, a courier knocked on the door at the Collins office. *See* Collins Declaration ¶ 6. An Employee, who is a clerk and helps process tax returns, opened the door and the courier handed the Employee the Rule 2004 Subpoena. *See* Collins Declaration ¶ 6.

7. The Rule 2004 Subpoena was directed to “Cary Collins, Collins & Associates.” *See* Exhibit “A,” Rule 2004 Subpoena. At the time of delivery of the Rule 2004 Subpoena, Cary Collins was not in the office but in New York. *See* Collins Declaration ¶ 5.

8. The Document Request attached to the Rule 2004 Subpoena required production of documents by May 4, 2010. The Document Request requested six categories of documents as more specifically set forth therein. *See*, Exhibit “A,” Document Request pp. 2-3.

9. Collins and Associates has served as an accountant and consultant to Scott Salyer and certain companies owned by or related to Mr. Salyer since May 1, 2009. Most recently, on or about November 17, 2009, Mr. Salyer retained Collins and Associates as his accounting advisor.

10. On or about June 8, 2009, Gary G. Perry Law Office retained Collins for certain consulting services and as an expert for the benefit of Salyer and related entities.

11. Collins has provided consulting services and advice to the Objecting Parties in the Criminal Matters and the Adversary Proceedings.

B. THE TRUSTEE HAS NOT REASONABLY COOPERATED IN PROVIDING RESPONDENTS WITH SUFFICIENT TIME TO RESPOND TO THE BROAD DOCUMENT REQUEST.

12. After receiving the Rule 2004 Subpoena and investigating the potential documents covered by the Document Request, Salyer’s counsel contacted Trustee’s counsel on April 28, 2010. *See* Supporting Declaration of Tania M. Moyron at ¶ 2 (“Moyron Decl.”). After explaining that there were a large number of documents that potentially could be responsive to the broad Document Request and that many of the documents were most likely protected by certain privileges, Salyer’s counsel requested that the production date be extended. *See* Moyron Decl. ¶ 2. Trustee’s counsel agreed to a ten-day extension from May 4, 2010 to May 14, 2010. *See* Moyron Decl. ¶ 2.

13. After further coordination among the Objecting Parties about the Document Request, it became evident that there were more than 16 bankers’ boxes of documents that would

1 need to be carefully reviewed. Because the Objecting Parties are jointly involved in defending
2 several lawsuits and Mr. Collins is an expert and a consultant in the Criminal Matters and the
3 Adversary Proceedings, any document production will necessarily require the efforts of the
4 multiple parties involved. With appreciation for the time involved in such a document production
5 (on top of the time also being devoted to the pending litigation in the Criminal Matters, the
6 Adversary Proceedings and the bankruptcy cases), counsel requested a reasonable extension of
7 time from May 14, 2010 to May 28, 2010 to produce documents. *See* Moyron Decl. ¶ 3.
8 Although the proposed production date was aggressive given the circumstances, the Objecting
9 Parties wanted to cooperate with the Trustee to avoid litigation expenses and to attempt to
10 produce the majority of documents within three weeks of the original production date. On the
11 morning of May 10, 2010, Salyer's counsel also informed Trustee's counsel that Mr. Collins
12 would be out of the office the week of May 17th. *See* Moyron Decl. ¶ 3.

13 14. On May 10, 2010, Trustee's counsel sent a letter to Salyer's counsel via e-mail
14 denying the request for an extension of time for the production of documents. *See* Moyron Decl.
15 ¶ 4. While Salyer's counsel disagreed with the unnecessary characterizations in Trustee's
16 counsel's letter, the Objecting Parties will not burden the Court and waste judicial resources on
17 this issue.

18 15. On May 12, 2010, Salyer's counsel sent an e-mail to the Trustee's counsel setting
19 forth the concerns related to the 2004 Exam Subpoena, the Document Request, and the
20 production date of May 14, 2010. *See* Moyron Decl. ¶ 5. Salyer's counsel corresponded with the
21 Trustee's counsel in an effort to try to resolve the issues between the parties without burdening
22 the Court. While Salyer's counsel received correspondence from the Trustee on May 13, 2010,
23 and the parties continue to exchange correspondence, no resolution has yet been reached. *See*
24 Moyron Decl. ¶ 6.

25 16. The current date for the production of documents and timely service of any
26 objections to the Rule 2004 Subpoena is May 14, 2010. Notwithstanding the Trustee's failure to
27 grant an extension, the Objecting Parties' responses and objections (the "Objections") to the Rule
28 2004 Subpoena will be served on the Trustee on May 14, 2010.

**II.
DISCUSSION**

A. THE COURT SHOULD QUASH THE RULE 2004 SUBPOENA BECAUSE IT IS PROCEDURALLY DEFECTIVE.

1. The Rule 2004 Subpoena is defective on its face because it was not properly served.

Rule 45 of the Federal Rules of Civil Procedure (the “Federal Rules”) governs subpoenas duces tecum for the production of documents with or without the taking of a deposition. Rule 45 allocates authority over subpoenas to the court for the district from which they are issued. Fed. R. Civ. P. 45(c)(3)(A).

Under Federal Rules 4(h) and 45(b), a subpoena directed to a corporation or unincorporated association may be served by delivering a copy to an officer, managing agent, general agent, or any other agent authorized by appointment or by law, and mailing a copy to the defendant. Fed R. Civ. P. 4(h)(1)(B); *NGV Gaming, Ltd. v. Upstream Point Molate, LLC* (“*NGV Gaming*”), 2009 U.S. Dist. LEXIS 71307 *6 (N.D. Cal., Aug. 13, 2009). Alternatively, Federal Rule 4(h)(1)(A), through Federal Rule 4(e)(1), authorizes service on individuals in any manner approved under state law, including those individuals who may be served on behalf of corporations and unincorporated associations. *Id.*

Under California Code of Civil Procedure § 416.10, service on a corporation may be made by delivering a copy to “the designated agent for service of process,” or to “the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the corporation to receive service of process.” Cal. Civ. Proc. Code § 416.10; *NGV Gaming* 2009 U.S. Dist. LEXIS 71307 at 6. Similarly, an unincorporated association may be served by service on “the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process [.]” *Id.* Moreover, in the Ninth Circuit, “service on an individual who holds a position that indicates authority within the organization generally is sufficient.” *Direct Mail Specialists v.*

1 *Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988).

2 The Objecting Parties move to quash the Rule 2004 Subpoena because service of the Rule
3 2004 Subpoena on Collins is defective. The Rule 2004 Subpoena was delivered to an Employee
4 who does not hold a position that indicates authority or is authorized under governing law to
5 accept service on behalf of Collins and Associates.

6 2. *The Rule 2004 Subpoena is defective on its face because it violates Rule*
7 *45(a)(2)(C) since it was not issued from the court for the district where the productions are to be*
8 *made.*

9 Federal Rule 45(a)(2)(C) provides, in relevant part, that a “subpoena must issue for
10 Production or inspection, if separate from a subpoena commanding a person’s attendance, from
11 the court for the district where the production or inspection is to be made.” Fed. R. Civ. P.
12 45(a)(2)(C); 11 William W Schwarzer, et al., *California Practice Guide, Federal Civil Procedure*
13 *Before Trial* § 11:2262 (2010)(A subpoena must issue from the court for the district in which the
14 records are to be produced or the inspection is to be made. Designating the wrong court renders
15 the subpoena void.); *Kremen v. Cohen*, 2007 U.S. Dist. LEXIS 97909 (D.C. Nor. Cal)(“All three
16 subpoenas violate Rule 45(a)(2)(C) because they were not issued from the court for the district
17 where the productions were to be made.”). Here, the Rule 2004 Subpoena issued to Collins
18 identifies the issuing court as the United States Bankruptcy Court, Eastern District of California,
19 but requires production in a court in the Northern District of California. The Rule 2004 Subpoena
20 is defective on its face because it should have been issued from the Northern District of California
21 where production is to be made.

22 Based on the foregoing, the Objecting Parties request an order quashing the Rule 2004
23 Subpoena without prejudice to the Objecting Parties seeking protective orders in the event the
24 Trustee issues valid subpoenas which the Objecting Parties in good faith believe exceed the
25 proper scope of discovery.

26 **B. THE COURT SHOULD QUASH THE SUBPOENA BECAUSE IT IS**
27 **OVERBROAD, BURDENSOME, UNREASONABLE AND OPPRESSIVE.**

28 A court may quash a subpoena duces tecum, the results of which it finds “unreasonable

1 and oppressive.” *Premium Service Corporation v. The Sperry & Hutchinson Company*, 511 F.2d
2 225, 229 (9th Cir. 1975) (other citations omitted). The Document Request, among other things,
3 requests “ALL documents” in a four year period between Collins and Associates, Salyer and
4 “Salyer Related Parties.” See Document Request Nos. 3, 5, and 6. The definition of “Salyer
5 Related Parties” is defined to include over 40 different parties. Such Document Requests pose
6 undue burden and expense as they are sweeping in nature, covering any paper exchanged among
7 the Objecting Parties over a four-year period. Moreover, the majority of the documents requested
8 are not relevant to the Debtor’s financial affairs and beyond the scope of Federal Rule of
9 Bankruptcy Procedure 2004(b) as set forth below in Section C.

10 Additionally, the Document Requests seek documents related to federal and state tax
11 returns and tax refunds. See Document Request Nos. 1 – 4. The Trustee did not comply with the
12 special notice and subpoena requirements under California Code of Civil Procedure § 1985.3 that
13 apply to obtain personal records of consumers held by third parties. May of the documents are
14 also protected on privacy grounds and should not be unnecessarily disclosed (especially when
15 most of the documents are not relevant). *Premium Service Corporation v. The Sperry &*
16 *Hutchinson Company*, 511 F.2d at 229.

17 Based on the foregoing, the Objecting Parties respectfully request that the Court quash the
18 Rule 2004 Subpoena.

19 **C. THE PENDING ADVERSARY PROCEEDINGS AGAINST THE OBJECTING**
20 **PARTIES PRECLUDE THE TRUSTEE FROM EXAMINING THE PARTIES**
21 **UNDER BANKRUPTCY RULE 2004.**

22 Bankruptcy Rule 2004 is a basic discovery device in bankruptcy cases. Fed. R. Bank. P.
23 2004; 9 *Collier on Bankruptcy* ¶ 2004.01 (Alan N. Resnick & Henry J. Sommer eds., 16th
24 ed.)(“*Collier*”). However, once an adversary proceeding or a particular contested matter is
25 pending, the discovery devices provided for in Bankruptcy Rules 7026-7037, which adopt various
26 discovery provisions of the Federal Rules of Civil Procedure, apply and Bankruptcy Rule 2004
27 should not be used. *Id.*; *In re Dinubilo*, 177 B.R. 932, 940-43 (E.D. Cal. 1993)(if a contested
28 matter or adversary proceeding is pending, Rule 2004 should not be used); *In re Blinder,*
Robinson & Co., 127 Bankr. 267, 274-75 (Bankr. D. Colo. 1991); see also *In re Bennett Funding*

1 *Group, Inc.*, 203 B.R. 24, 27 (Bankr. N.D.N.Y. 1996); *In re Valley Forge Plaza Associates*, 109
2 B.R. 669 (Bankr. E.D. Pa. 1990); *In re Kipp*, 86 B.R. 490 (Bankr. W.D. Tex. 1988); *In re French*,
3 145 B.R. 991 (Bankr. D.S.D. 1992).

4 Here, the six Adversary Proceedings were commenced *before* the filing of the Ex Parte
5 Application for Rule 2004 Order. By way of the Ex Parte Application for Rule 2004 Order, the
6 Trustee seeks documents that are the subject of issues that will be litigated in the Adversary
7 Proceedings. By way of example, the Document Request seeks the production of “ALL
8 Documents Relating to correspondence” between Salyer and the “Salyer Related Entities” within
9 the last four (4) years (irrespective of whether the documents are related to the Debtors). *See*
10 Document Request Nos. 4 & 5. The term “Salyer Related Entities” is defined in the Document
11 Request to include, among other parties, all the defendants in the Adversary Proceedings. *See*
12 Exhibit “A,” Definitions in Document Request. In other words, the Document Request seeks all
13 correspondence among co-defendants in six Adversary Proceedings. Such a run around the
14 formal discovery process in the Adversary Proceedings is a completely improper use of Rule
15 2004, and the procedural safeguards available under the Federal Rules of Civil Procedure should
16 not be abandoned when there are pending Adversary Proceedings. *In re Dinubilo, supra*,
17 (holding that the Bankruptcy Court’s order for the 2004 examination did not provide any reason
18 for abandoning the procedural safeguards applicable to a deposition in a contested matter).

19 The Objecting Parties will be irreparably injured if the Trustee is given unfettered
20 authority to use Rule 2004 examination to discover information relevant to the pending Adversary
21 Proceedings. *See In Re Blinder, Robinson & Co.*, 127 B.R. at 274 (The Court held: “There is a
22 strong argument that Intercontinental will be irreparably injured if the Trustee is given unfettered
23 authority to use Rule 2004 examination to discover information relevant to the pending adversary
24 proceeding. The Trustee argues that Intercontinental’s remedy is to seek suppression of the fruits
25 of any improper discovery in the collateral litigation. However, by that time the damage will
26 already have been done. As noted above, the Trustee must make a tactical decision on how to
27 proceed with discovery. Having elected to file an adversary proceeding against Intercontinental
28 before examining it under Rule 2004, it is now limited to discovery under the Federal Rules.”).

1 In sum, the Trustee's attempt to engage in extensive and broad discovery by utilizing Rule
2 2004 instead of conducting discovery in the Adversary Proceedings is improper and a waste of
3 judicial resources. As a result, the Objecting Parties request no discovery be permitted pursuant
4 to the Rule 2004 Order and that the Trustee be limited to discovery under the Federal Rules in the
5 pending Adversary Proceeding.

6 **D. IN THE EVENT THAT THE COURT DOES NOT QUASH THE RULE 2004**
7 **SUBPOENA OR PRECLUDE FURTHER DISCOVERY PURSUANT TO**
8 **BANKRUPTCY RULE 2004, THE COURT SHOULD ENTER A PROTECTIVE**
9 **ORDER LIMITING THE SCOPE OF THE SUBPOENA.**

10 Bankruptcy Rule 7026(c), incorporating Federal Rule 26, governs the granting of a
11 protective order. A court may, for good cause, issue an order to protect a party or person from
12 annoyance, embarrassment, oppression, or undue burden or expenses. Fed. R. Civ. P. 26(c). The
13 Objecting Parties submit that they have attempted to meet and confer with the Trustee in an effort
14 to resolve the dispute without Court action as set forth above in Section I (B) and in the Moyron
15 Declaration. As those attempts proved futile, the Objecting Parties request that the Court modify
16 the Rule 2004 Subpoena or issue a protective order as set forth below.

17 First, the Objecting Parties request that this Court issue a protective order to, among other
18 things, provide the Objecting Parties more time to respond to the Document Request in the
19 Subpoena. Compliance by May 14, 2010 is unreasonable and poses an undue burden on the
20 Objecting Parties as set forth above. Based on the foregoing, the Objecting Parties request that
21 the production date be moved to thirty days after the hearing on this Motion.

22 Second, the Objecting Parties request that the Court limit the scope of the Rule 2004
23 Order consistent with Bankruptcy Rule 2004(b). Many of the Document Requests are outside the
24 scope of Bankruptcy Rule 2004(b) because they seek documents, among other things, not related
25 to the liabilities and financial condition of the Debtors' estates or any matter which may affect the
26 administration of the Debtors' estates. Indeed, many of the Document Requests are related to
27 correspondence between Salyer and nondebtor entities that do not affect the Debtors. *See*
28 Document Request Nos. 5 and 6. Moreover, the Document Request exceeds the scope of the Ex
Parte Application for Rule 2004 Order. For example, in the Ex Parte Application for Rule 2004

1 Order the Trustee states that “good cause exists to order the examination of Collins because it
2 may possess knowledge related to the financial affairs of the Debtor, including potential tax
3 refunds, which would affect the interest of creditors and have serious implications on the
4 administration of the Debtors’ estates.” *See* Ex Parte Application for Rule 2004 ¶ 16. However,
5 Document Request Nos. 2, 5 and 6 are so broad that they request documents that do not even
6 relate to the financial affairs of the Debtors or potential tax returns. *See* Exhibit “A,” Document
7 Request.

8 Third, the Objecting Parties request that the Court limit the scope of the Rule 2004 Order
9 to preclude production of privileged documents. The production of documents pursuant to the
10 Rule 2004 Order is subject to the doctrine of privileged communications. *Collier*, ¶ 2004.02[4].
11 The Objecting Parties submit that many documents requested by the Objecting Parties are
12 protected by, but not limited to, the following privileges: (1) attorney-client privilege; (2) work
13 product doctrine; (3) Fifth Amendment privilege against self-incrimination; (4) joint defense
14 privilege; (5) financial privacy and confidentiality privileges; and (6) taxpayer privileges. True
15 and correct copies of the objections to the Document Request served on Trustee’s Counsel are
16 attached to the Exhibit Document as Exhibit “B.” The Objecting Parties preserve any and all
17 rights to assert additional privileges and objections to the Document Request. Additionally, the
18 Objecting Parties request that the Court set a hearing, if necessary, to rule on the applicable
19 privileges.

20 III. 21 CONCLUSION

22 Based on the foregoing, the Objecting Parties respectfully request (1) the entry of an order
23 quashing the Rule 2004 Subpoena; (2) the entry of an order precluding production of documents
24 pursuant to the Rule 2004 Order; or, in the alternative, (3) the entry of a protective order

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1 extending the production date until 30 days after the hearing on this Motion and limiting the
2 scope of the Document Request as set forth in the Motion; (4) entry of an order awarding
3 attorneys' fees incurred in connection with the Rule 2004 Subpoena, the Objections, and the
4 Motion according to proof; and (5) granting such other and further relief as may be just and
5 proper under the circumstances.

6 DATED: May 14, 2010

Respectfully submitted,

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8 FELDERSTEIN FITZGERALD
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9 /s/ Paul J. Pascuzzi

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16 /s/ Larry Lichtenegger

LARRY LICHTENEGGER

17 SK PM Corp., SK Foods, LLC, SKF Canning,
18 LLC, Blackstone Ranch Corporation, Monterey
Peninsula Farms, LLC, Salyer Management
Company, LLC, SK Farms Services, LLC, SK
Frozen Foods, LLC, SS Farms, LLC, SSC
Farming, LLC, SSC Farms I, LLC, SSC Farms II,
LLC, SSC Farms III, LLC, SKF Aviation, LLC,
CSSS, LP d/b/a Central Valley Shippers, the Fred
Salyer Irrevocable Trust, and Gerard Rose as
Trustee of the Fred Salyer Irrevocable Trust

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21 /s/ Richard S. E. Johns

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